IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 05-CV-0329 GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

BRIEF OF AMICI CURIAE NATIONAL CHICKEN COUNCIL, U.S. POULTRY & EGG ASSOCIATION AND NATIONAL TURKEY FEDERATION

In Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction

The National Chicken Council (NCC), U.S. Poultry & Egg Association (USPEA) and National Turkey Federation (NTF) (collectively "Amici Curiae") submit this brief in support of Defendants' Opposition to Oklahoma's Motion for Preliminary Injunction (Motion).

Amici Curiae represent the interests of poultry producers through research, education and advocacy with regard to federal and state programs and regulations that affect the industry. The NCC is a nonprofit member organization representing companies that produce and process over 90 percent of the broiler/fryer chickens marketed in the United States. The USPEA is the world's largest poultry organization, whose membership includes producers of broilers, turkeys, ducks, eggs and breeding stock, as well as allied companies. The NTF is the national advocate for all segments of the turkey industry.

Oklahoma's Motion is founded on Count 3 of its Complaint, which asserts claims under the citizen suit provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq*. The Motion must be denied because RCRA does not apply to the categories of activities and substances at which the Motion is aimed. Those types of activities and substances are subject to the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq*., and therefore they are expressly excluded from RCRA's coverage. 42 U.S.C. §§ 6903(27), 6905(a). Consequently, Oklahoma cannot demonstrate any likelihood of success on the merits of its claim.

I. Alleged Application of Poultry Manure in Excess of Agricultural Needs is the Crux of Oklahoma's Motion

Oklahoma strains to characterize the use of poultry manure to fertilize crops as the disposal of "solid waste" under RCRA. This mischaracterization contradicts the express conclusions of both Congress and the United States Environmental Protection Agency (EPA), which Congress charged with implementing RCRA. In enacting RCRA, Congress explicitly determined that, as a category, "[a]gricultural wastes which are returned to the soil as fertilizer or soil conditioners are not considered discarded materials in the sense of this legislation." H.R. Rep. No. 94-1491, 94th Cong., 2d Sess., at 2. Similarly, EPA concluded that "manures and crop residues, returned to the soil as fertilizers or soil conditioners," are excluded from its entire RCRA regulatory program for controlling the "dumping" of solid waste. EPA, Solid Waste Disposal Facilities, Proposed Criteria for Classification, 43 Fed. Reg. 4942, 4943 (Feb. 6, 1978).

In the face of these categorical exclusions, Oklahoma advances an extraordinary and hyper-technical allegation: that the incremental portion of a

manure's nutrient content that is above the precise agricultural needs of the vegetation being fertilized must have been applied by the farmer with an intent to discard it, making that portion a "solid waste" for purposes of RCRA Section 7002, 42 U.S.C. § 6972(a)(1)(B). In its Complaint, Oklahoma contends that "the application of poultry waste to lands within the IRW, in the amounts that it is applied, is in excess of any agronomic need and is not consistent with good agricultural practices" because it "exceeds the capacity of the soils and vegetation to absorb those nutrients present in the poultry waste." Second Am. Compl. ¶¶ 49, 50. The result, Oklahoma alleges, is "the run-off and release of large quantities of phosphorous and other hazardous substances, pollutants and contaminants in the poultry waste onto and from the fields and into the waters of the IRW." Id. at ¶ 51. Likewise, Oklahoma asserts in its Motion that water pollution in the IRW is the result of farmers applying more manure than is needed "under good agronomic practices." Mot. at 6, 13 n. 7. In Oklahoma's opinion, all of the "imminent and substantial endangerment" upon which its Motion is premised results directly from this land application of manure in excess of agricultural needs and the ensuing run off to waters of the IRW.

It is important to note that Oklahoma has couched its allegations in broad, categorical terms, and that the applicability of federal statutes to those allegations must be assessed in similarly broad terms. Assuming, *arguendo*, that Oklahoma's broad allegations are correct, then the types of activities and substances at issue in this action are subject to the extensive federal regulatory program established pursuant to the CWA. In that program, Congress and EPA specifically have

provided for sanctions, citizen suits and emergency actions to address any excessive land application of manure that might run off and pollute water resources.

II. Discharges From Excessive Land Application of Poultry Manure are Subject to the Clean Water Act

The types of actions – as well as the consequences – targeted by Oklahoma's Motion are subject to liability and regulation under the CWA. Indeed, EPA, the State of Arkansas and most other States are implementing a detailed regulatory, permitting and enforcement program under the CWA aimed at the precise issues raised by Oklahoma's Motion.

The CWA prohibits the "discharge of any pollutant" except as in compliance with enumerated provisions, including Section 1342, which establishes a national permitting system. 33 U.S.C. § 1311(a). The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source," Id. § 1362(12), and then defines "point source" as, among other things, a "concentrated animal feeding operation," or CAFO. Id. § 1362(14). The definition of "point source" also explicitly excludes "agricultural stormwater discharges." Id. Consequently, there must be a determination of whether the runoff of land-applied manure into surface waters is the "discharge of a pollutant" or an "agricultural stormwater discharge."

To summarize, the CWA makes unlawful the discharge of pollutants from a CAFO unless (a) permitted pursuant to a federal or State permit program or (b) exempted as agricultural stormwater. Such unlawful activity is punishable by civil penalties of tens of thousands of dollars per day or, under some circumstances, by criminal sanctions. Id. § 1319. Violations also may be remedied through a "citizen

suit" under the CWA against a point-source discharger, such as a CAFO. Id. §1365. 1/ The Administrator of EPA also has emergency authority to seek injunctive relief in federal district court to "restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing" to a situation "presenting an imminent and substantial endangerment." Id. § 1364.

In 2003, EPA revised its national CWA program for regulating discharges from CAFOs. See EPA, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176-7274 (Feb. 12, 2003). This action responded to statutory amendments enacted in 1987, directing EPA to update regulations for a number of "industry categories." Id. at 7186. EPA pointed out that "[o]ne of the industries for which the Agency established a schedule [to revise regulations] was 'Feedlots' (swine, poultry, dairy and beef cattle)." Id. As pertinent here, EPA included two key elements in its program:

- A CAFO is defined either as an animal feeding operation above a certain size or one which EPA or the State has determined is "a significant contributor of pollutants to waters of the United States." 40 CFR § 122.23(b), (c). 2/

1/ Under this provision, the Governor of a State may sue EPA when that Agency fails to enforce the Act in another State and the result is an "adverse effect on the public health or welfare in his State. . . ." 33 U.S.C. § 1365(h).

2/ A State within which the facility is located may make this designation if it operates the CWA permit program. 40 CFR § 122.23(c)(1)(i). In addition, U.S. EPA may make the designation for facilities in states, such as Oklahoma, where EPA

- Discharges of land-applied manure into water are deemed to be point-source discharges "from" the associated CAFO unless the farmer applies at a rate that ensures appropriate agricultural utilization of the nutrients.

In adopting this requirement, EPA said:

> The discharge of manure . . . to waters of the United States from a CAFO as a result of the application of that manure . . . by the CAFO to land areas under its control is a discharge from that CAFO subject to [CWA] permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure . . . has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure . . . a precipitation-related discharge . . . from land areas under the control of a CAFO is an agricultural stormwater discharge.

Id., § 122.23(e) (emphasis added).

The Second Circuit upheld these elements of EPA's CAFO regulations against challenges brought by agricultural and environmental petitioners. See Waterkeeper Alliance et al. v. EPA, 399 F.3d 486 (2d Cir. 2005). That Court explicitly endorsed EPA's rationale for drawing the line between industrial CAFO discharges and agricultural stormwater discharges:

> [L]ike the Clean Water Act itself, the CAFO Rule seeks to remove liability for agriculture-related discharges primarily caused by nature, while maintaining liability for other discharges. . . . [D]ischarges from land areas under the control of a CAFO can and should generally be regulated, but where a CAFO has taken steps to ensure appropriate agricultural utilization of the nutrients in manure . . . it should not be held accountable for any discharge that is primarily the result of 'precipitation.'

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operates the permit program, and also when a facility in one State is contributing to impairment of water quality in another (downstream or adjacent) State. Id.

Id. at 508-09. Thus, the Second Circuit upheld EPA's interpretation that the CWA regulates as point sources those industrial discharges about which Oklahoma complains in its Motion – discharges of pollutants from a CAFO as a result of applying manure in excess of the agricultural needs of the land and the vegetation on it. 3/

3/ In Oklahoma, the CWA CAFO program is implemented by EPA. In addition, Oklahoma has enacted the Oklahoma Concentrated Animal Feeding Operations Act (the "Act"), Okla. Stat. tit. 2, § 20-40 *et seq*. (2007), which, among other things, requires all CAFOs to obtain a license to operate. See Okla. Stat. tit.2, § 20-44; Okla. Admin. Code 35:17-3-1 *et seq*. A CAFO may maintain compliance with the Act by ensuring that manure applications to land do not exceed the nutrient needs of crop coverage or planned crop planting. Id. § 20-48(C)(4). The Act authorizes the State to investigate complaints or determine whether there are any violations of the Act, Okla. Stat. tit.2, § 20-52(A), and requires at least one unannounced inspection per year of every licensed animal feeding operation. Okla. Stat. tit.2, § 20-52(A). A violation points system authorizes suspension or revocation of a license after a certain number of points are accrued. See Okla. Admin. Code 35:17-3-22. The Act also provides for the imposition of criminal and civil penalties, see Okla. Stat. tit.2, § 20-62, and authorizes the Department of Agriculture, Food, and Forestry to bring an action in district court for injunctive relief. Okla. Stat. tit.2, § 20-62(C).

In Arkansas, the Arkansas Department of Environmental Quality ("ADEQ") and the Arkansas Pollution Control and Ecology Commission ("APCEC") have authority to carry out the National Pollutant Discharge Elimination System ("NPDES"). See Ark. Code s 8-4-208. As set forth in APCEC Regulation No. 6.501, which relates to the state's CAFO dry litter program, CAFOs "that have an actual discharge are considered a point source of pollution and are regulated under [NPDES] permitting process, 40 C.F.R. 122.21(a)." APCEC Reg. 6.501.

Sections III and IV of the Brief of Amicus Curiae American Farm Bureau Federation in Support of Abstention of Federal Jurisdiction provides additional discussion regarding the improper interference with the regulatory schemes of two states that an injunction would cause, and the potential for an injunction to subject growers to conflicting standards of conduct. NCC, USPEA, and NTF hereby adopt and incorporate that discussion by reference.

III. RCRA Does Not Apply to the Activities and Substances Addressed by Oklahoma's Motion

As a matter of law, RCRA does not apply to the claims on which Oklahoma has founded its Motion because those claims, being subject to the CWA, are excluded from RCRA. Congress enacted this rule of law in two separate provisions:

1. In the definition section of RCRA, Congress made clear that the term "solid waste" "does not include solid or dissolved material in . . . industrial discharges which are point sources subject to permits under Section 1342 of Title 33 [i.e., the CWA]. . . ." 42 U.S.C. § 6903(27).

2. In a special section of RCRA designed to ensure integration of the statute with other environmental laws, and to avoid duplication of the liabilities and requirements of those laws, Congress provided that "[n]othing in this chapter shall be construed to apply to . . . any activity or substance which is subject to the [CWA] . . . except to the extent that such application . . . is not inconsistent with the requirements of [the CWA]." Id., § 6905(a).

A. Definition of Solid Waste

Discharges of CAFO manure that have been applied without ensuring appropriate agricultural utilization of its nutrients are excluded from RCRA's definition of solid waste. As demonstrated above, EPA has regulated CAFOs as an industrial category. EPA also has determined that runoff of manure or its constituents from land application areas is a discharge from the CAFO itself (which is defined by the CWA as a "point source") when the manure was applied to the land without ensuring "appropriate agricultural utilization of the nutrients in the

manure," and that such discharges are subject to CWA permits. 4/ 40 CFR § 122.23(e). The Second Circuit has explicitly upheld these conclusions. Waterkeeper Alliance, 399 F.3d at 508-09. Consequently, such discharges are excluded from the definition of "solid waste." 42 U.S.C. § 6903(27).

Other courts have applied this statutory exclusion in very similar circumstances. Most recently, in Coldani v. Hamm, 2007 WL 2345016 (Aug. 16, 2007, E.D. Cal.), the court dismissed a claim under the citizen suit provision of RCRA which asserted, as Oklahoma does here, that land application of manure was causing or contributing to an imminent and substantial endangerment as a result of discharges from the land to surface water and groundwater. The court found that, because a discharge from the defendant's CAFO "constitutes industrial discharge from a point source subject to . . . permits under the CWA," that discharge was excluded from RCRA. Id. at * 10; see also, State v. PVS Chemicals, Inc., 50 F. Supp. 2d 171, 176-78 (W.D.N.Y. 1998); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1328-29 (S.D. Iowa 1997).

B. Integration Provision

Likewise, in RCRA Section 1006(a), Congress exempted from the entire statute any activity or substance that is subject to the CWA. 42 U.S.C. § 6905(a).

4/ There can be no doubt that such discharges are "subject to permits" under the CWA, which prohibits point-source discharges without a permit. 33 U.S.C. §1311(a). "EPA has consistently interpreted the language 'point sources subject to permits under [section 402 of the Clean Water Act]' to mean point sources that should have a NPDES permit in place, whether in fact they do or not. Under EPA's interpretation of the 'subject to' language, a facility that should, but does not, have the proper NPDES permit is in violation of the CWA, not RCRA". Memo from Michael Shapiro and Lisa Friedman (OGC) to Waste Management Division Directors, Regions I-X, Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste, at 2 (Feb. 17, 1995) (emphasis added).

The only exception is where the application of RCRA would not be inconsistent with CWA requirements. Id. As discussed above, discharges from land application areas associated with CAFOs clearly are activities subject to the CWA. In addition, the substances addressed in Oklahoma's Motion are heavily regulated under the CWA. 5/ The remaining question, then, is whether Oklahoma's RCRA citizen suit, as well as the relief sought in Oklahoma's Motion, would amount to an "application" of RCRA that is inconsistent with CWA requirements.

The relief sought in Oklahoma's Motion, indeed the entire claim set forth in Count 3, could not be more contrary to the CWA regulatory regime for discharges of land-applied manure. To begin with, Oklahoma's indiscriminate moratorium -- covering the entire one-million-acre IRW, see Mot. at 9, 24-- would necessarily require cessation of activities throughout the IRW that are deemed lawful under the CWA. 6/ It would halt whole categories of activities approved by U.S. EPA pursuant to its detailed CAFO regulatory program. It also would halt activities deemed lawful by Congress pursuant to the CWA's agricultural stormwater exemption. 33 U.S.C. § 1362(14). In these respects, the relief requested in

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5/ See CAFO rule preamble, 68 Fed. Reg. 7176, at 7235 (describing that "[t]he primary pollutants associated with animal wastes are nutrients (particularly nitrogen and phosphorus), organic matter, solids, pathogens, and odorous/volatile compounds.")

6/ Oklahoma's request also would halt manure application to IRW lands on which no animal manure has ever been applied; lands that do not have the "thin rocky soil" about which Oklahoma is concerned, Mot. at 2, and lands for which the soils do not have excessive nutrient loadings or concentrations of other potential water pollutants. It also would apply to lands which, because of natural or manmade features, have virtually no chance of causing pollutants to drain into surface waters or shallow groundwater. And it would bar manure application on lands covered by the State's numerous statutes and regulations designed to ensure proper land application of manure, including Okla. Stat. tit. 2 § 20-48 and Okla. Admin. Code 35:17-3-14.

Oklahoma's Motion amounts to an application of RCRA that is grossly inconsistent with the CWA. It is therefore proscribed by 42 U.S.C. § 6905(a).

In Coon, et al. v. Willet Dairy, LP, et al., 2007 WL 2071746 at *5-6 (July 17, 2007, N.D.N.Y.), appeal docketed, No. 07-3454 (2d. Cir. Aug. 13, 2007), the court faced a discrete version of Oklahoma's Motion. Citizen plaintiffs sued the owner of a large CAFO, claiming that its discharges of waste had caused various environmental problems. The defendants moved for summary judgment on the plaintiffs' RCRA claims, arguing that those claims were precluded because the farm was a point source regulated by the CWA. The court granted the defendants' motion, relying in part on RCRA Section 1006(a), and held that "allowing Plaintiffs' RCRA cause of action to proceed would violate . . . § 6905(a)" because that cause of action was "based on the same activities and substances that the CWA permit covered: namely, Defendants' handling of manure and other agricultural waste." Id. at *6.

Likewise, in the instant case Oklahoma's Motion is based on activities and substances that are subject to the CWA and EPA's regulatory program. Because Oklahoma's proposed moratorium would be inconsistent with the CWA, RCRA Section 1006(a) precludes the relief Oklahoma seeks in its Motion.

The same conclusion must be reached, but for different reasons, with respect to activities that may be unlawful under the CWA. 7/ Those activities (e.g. discharges from over-application of manure without a permit) are subject to the extensive civil and criminal provisions of the CWA, as well as citizen suit provisions

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7/ By making this argument, Amici Curiae do not concede that any violations have occurred under the CWA, and dispute Oklahoma's broad-brush allegations of "imminent and substantial endangerment."

and "imminent and substantial endangerment" provisions, that Congress designed specifically to address such problems. Oklahoma's broad-brush moratorium is inconsistent with these remedies and authorities in numerous respects.

Most important, Oklahoma could not bring its blunderbuss citizen suit under Section 505 of the CWA, 33 U.S.C. § 1365, because it lacks standing to do so and has failed to provide the requisite notice. It is well established that a citizen lacks standing to bring an action under this provision for wholly past violations. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S.49 (1987); Sierra Club v. El Paso Gold Mines, Inc., 421 F. 3d 1133, 1139-41 (10th Cir. 2005) (distinguishing discharges from point sources occurring at the time of the suit from the ongoing migration of pollutants resulting from past discharges). Oklahoma has offered only vague and broad allegations of past pollutant discharges, never once identifying a particular CAFO from which manure is being added to surface waters as a result of over-application to the land. Mot. at 6.

Similarly, Oklahoma has not provided the advance notice mandated by Section 505 and EPA's regulations, which require plaintiffs to provide notice that includes "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, [and] the date or dates of such violation . . . ." 40 CFR § 135.3(a). (emphasis added).

Thus, Oklahoma's amorphous RCRA citizen suit and Motion would circumvent the procedural requirements of the CWA and are inconsistent with the

CWA remedies Congress created to address the very problems alleged in Oklahoma's Motion. Accordingly, RCRA Section 1006(a) requires that the Motion be denied.

CONCLUSION

For the foregoing reasons, Oklahoma's Motion for Preliminary Injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 15th of February, 2008, I electronically transmitted the foregoing document to the Clerk of the court using ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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